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 of Nationwide Connections, Inc., Access One
 Communications, Inc., Network One Services, Inc.,
 411TXT, Inc., CELL-INFO-USA, Inc., Enhanced Billing
 Services, Inc., Toll Free Connect, Inc., Cripple Creek
 Holdings, LLC, Built to Last, LLC, Not Fade Away, LLC,
 He's Gone, LLC, The Other One, LLC, Turn on Your Love
 light, LLC, China Cat Sunflower, LLC, and Lazy River Road
 Holdings, LLC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re) Case No. 07-52890-ASW
)
 THE BILLING RESOURCE, dba Integretal, a) [Chapter 11]
 California corporation,)
 Debtor.)
 [Taxpayer's Identification No. 33-0289863]

THE BILLING RESOURCE, dba
 INTEGRETAL, a California corporation,

Plaintiff,
 vs.

FEDERAL TRADE COMMISSION, and
 DAVID R. CHASE, not individually, but solely
 in his capacity as receiver for Nationwide
 Connections, Inc., Access One Communications,
 Inc., Network One Services, Inc., 411TXT, Inc.,

Adv. No. 04-05156

**FEDERAL RECEIVER'S
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN OPPOSITION TO
 EMERGENCY MOTION FOR
 TEMPORARY RESTRAINING ORDER
 AND ORDER TO SHOW CAUSE RE:
 PRELIMINARY INJUNCTION AND
 DECLARATORY RELIEF**

1	CELL-INFO-USA, INC., Enhanced Billing)	
	Services, Inc., Toll Free Connect, Inc., Cripple)	Date: September 26, 2007
2	Creek Holdings, LLC, Built to Last, LLC, Not)	Time: 2:15 p.m.
	Fade Away, LLC, He's Gone, LLC, The Other)	Place United States Bankruptcy Court
3	One, LLC, Turn on Your Love Light, LLC,)	280 South First Street
	China Cat Sunflower, LLC, Lazy River Road)	San Jose, California
4	Holdings, LLC,)	Judge: Hon Arthur S. Weissbrodt
	Defendants.)	Courtroom: 3020

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6 Defendant David R. Chase, the United States District Court-Appointed Receiver (the

7 "Federal Receiver"), submits herewith his Memorandum of Points and Authorities in Opposition

8 (the "Opposition") to the Emergency Motion For Temporary Restraining Order and Order to Show

9 Cause Re: Preliminary Injunction and Declaratory Relief filed by The Billing Resource, dba

10 Integretal, a California corporation (the "Debtor"), filed and served in this matter on or about

11 September 24, 2007 (the "TRO Motion").¹ The grounds for such opposition are as described below.

12 I.

13 **SUMMARY OF ARGUMENT**

14 Debtor is seeking an order from this Court which will contradict and frustrate specific

15 unambiguous Orders and findings (collectively, the "District Court Orders") of the United States

16 District Court in the Southern District of Florida (the "District Court"). Initially, this attempt was

17 made through a Motion for Approval of Use of Cash Collateral, in which the Debtor failed to

18 disclose the true nature of those District Court Orders. The District Court, obviously concerned

19 with this tactic, issued a Clarification Order just prior to the hearing on the Cash Collateral Motion

20 specifically and unambiguously stating two matters that control any action herein. The first

21

22 ¹ The Federal Receiver expressly reserves his right to file appropriate motions under Federal Rule

23 of Civil Procedure 12(b) to dismiss the Debtor's complaint and the herein requested injunctive

24 relief as against all Receivership entities named therein that do not own or claim ownership to the

25 subject receivership funds, which entities include: Nationwide Connections, Inc., 411TXT, Inc.,

26 CELL-INFO-USA, Inc., Enhanced Billing Services, Inc., Toll Free Connect, Inc., Cripple Creek

27 Holdings, LLC, Built to Last, LLC, Not Fade Away, LLC, He's Gone, LLC, The Other One, LLC,

28 Turn on Your Love light, LLC, China Cat Sunflower, LLC, and Lazy River Road Holdings, LLC.

In addition, the Receiver expressly objects to the exercise of jurisdiction by the United States Bankruptcy Court over the subject matter of the Debtor's complaint and expressly reserves all of the Receiver's objections to the jurisdiction of the United States Bankruptcy Court to hear and determine the matters in question as well as expressly reserves all of the Receiver's rights to trial by jury in the United States District Court.

1 holding was that the District Court had ruled that the subject Receivership Funds were not property
2 of the Bankruptcy Estate. The second was that the contempt proceedings in the District Court (the
3 “District Court Proceedings”) were not subject to the automatic stay herein, but, instead, fell under
4 the Regulatory Powers Exception set forth in 11 U.S.C. § 364(b)(4). Finally, the District Court
5 made its intent perfectly clear – the Debtor was to turn over the receivership funds to the Federal
6 Receiver “immediately” under pain of contempt. In so doing, it quoted judicial authority holding
7 that incarceration was an appropriate remedy in respect of such an order.

8 Debtor now comes before this Court, again, asking it to block the effect of and ignore the
9 expressed order of the District Court, this time by employing injunctive relief under section 105 of
10 the Bankruptcy Code. Its purported evidence is the assertions in the Declaration of Ken Dawson
11 (the “Dawson Declaration”). Section 105 has no application here and the Dawson Declaration does
12 not provide any evidence required for the relief requested.

13 Application of Bankruptcy Code Section 105 is only proper in situations where provisions
14 of the Bankruptcy Code are advanced. Here, there is no such provision. Cash collateral use is only
15 allowed in respect of property of the estate, and, as discussed above, the District Court has held that
16 the Receivership Funds are property of the Federal Receiver, and not property of the Bankruptcy
17 Estate. Nor can the Debtor rely on Bankruptcy Code Section 362. Again, the District Court has
18 specifically held that the District Court’s proceedings are not barred by the automatic stay. Finally,
19 not only does the application of section 105 to the facts here not further provisions of the
20 Bankruptcy Code, but it contravenes a specific section of the Bankruptcy Code. 11 U.S.C. §
21 362(b)(4) excepts police power and regulatory actions from the automatic stay. Again, the District
22 Court has found that the District Court proceedings fall under this exception. Application of
23 Section 105 would run counter to section 362(b)(4) as well as, of course, the specific provisions of
24 the District Court Orders.

25 Now Debtor claims that the proceedings in the District Court (the “District Court
26 Proceedings”) should be enjoined because of the expenses of litigation. However, the very case
27 that Debtor cites in its motion In re Alliance Mortgage, 264 B.R. 634 (C.D. Cal 2001) holds just the
28 opposite: litigation costs are not a sufficient threat to justify the relief sought nor do they establish

1 irreparable harm. And while courts have entertained requests for such relief when assets of the
2 estate are threatened, the Receivership Funds have been adjudicated to not be assets of the
3 bankruptcy estate.

4 Debtor argues that it may go out of business if is not able to spend the Receivership Funds.
5 This, alone, demonstrates Debtor's game plan here, which is to obtain an Order from this Court in
6 derogation of the District Court and hide behind it, using it for an excuse on appeal as to why it
7 should not be held in contempt, while it does exactly what the District Court has ordered it not to
8 do, spend the Receivership Funds on its operations.

9 Further, the Dawson Declaration does not make the showing required to grant a section 105
10 injunction. It simply consists of paragraphs lifted from the Cash Collateral Motion. It asserts that
11 the Debtor believes it can confirm a plan of reorganization, but it gives this Court absolutely no
12 evidence upon which that assertion is based. What it does do, however, is to make it clear beyond
13 doubt that the Debtor, rather than preserving the status quo, intends to waste the Receivership
14 Funds.

15 The Debtor concedes that the automatic stay does not apply to the FTC's prosecution of the
16 Florida Action, but somehow attempts to carve out from that prosecution the actions of the
17 Receiver who was appointed by the District Court in furtherance of the FTC's prosecution. See
18 Footnote 1 to the TRO Motion. There is no distinction. The Receiver is, in effect, a
19 "representative and fiduciary" of the United States District Court in a federal receivership
20 proceeding, and the September 21, 2007 United States District Court Order specifically determined
21 that the Section 362 stay did not apply to that federal receivership proceeding and vacated its (the
22 District Court's) September 20, 2007 Order staying the proceeding.

23 In addition, the Debtor argues that this Court is the only court that can fashion appropriate
24 injunctive relief. See Introduction to TRO Motion at lines 19-20. However, the Debtor concedes
25 that it is seeking injunctive relief on identical issues not only from this court, but from District
26 Court in Florida and from the Court of Appeals for the 11th Circuit. The Debtor is clearly
27 attempting to re-litigate in this Court, by motion and by adversary proceeding, issues regarding the
28

1 application of the stay and determination of property of the estate already conclusively determined
2 by the District Court. The equitable powers of 11 U.S.C. § 105(a) are not designed for such relief.

3 This Court is respectfully requested to deny the request for temporary restraining order or,
4 if this Court is inclined to grant such a relief, to preserve the status quo by requiring the Debtor to
5 segregate, sequester and account for the Receivership Funds or to pay said funds into the registry of
6 this Court.

7 8 II.

9 ARGUMENT

10 A. INJUNCTIVE RELIEF IS IMPROPER UNDER SECTION 105 OF THE BANKRUPTCY 11 CODE.

12 1. An Injunction Is Not Necessary to Carry Out the Purposes of the Bankruptcy Code.

13 Exercise of a bankruptcy court's discretionary authority to issue Section 105 injunctive
14 relief is appropriate only when necessary to carry out the provisions of the Bankruptcy Code. In re
15 Middleton Arms, Ltd. Partnership, 934 F.2d 723, 724 (6th Cir. 1991); see also Norwest Bank
16 Worthington v. Ahlers, 485 U.S. 197, 203 (1988) ("whatever equitable powers remain in the
17 bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code").
18 In Powerine Oil Co. v. Koch Oil Co., 59 F.3d 969, 973 (9th Cir. 1995), cert. denied, 516 U.S. 1140
19 (1996), the Ninth Circuit relied on Norwest Bank, holding that "[e]quity may not be invoked to
20 defeat clear statutory language, nor reach results inconsistent with the statutory scheme established
21 by the Code." Here, there are no provisions of the Bankruptcy Code which this injunction
22 promotes. It does not promote section 363. The Receivership Funds are not property of the estate,
23 and their use cannot be authorized by the cash collateral order or otherwise. The District Court
24 Orders could not be clearer. The Debtor is not to spend the Receivership Funds. Nor does the
25 requested relief promote section 362. Again, the District Court has already adjudicated that the
26 District Court proceedings are exempt from the automatic stay.

27 The power to issue injunctions under Section 105 does not extend to the issuance of orders
28 that conflict with other, specific federal statutory mandates. In re Rohnert Park Auto Parts, Inc.,

1 113 B.R. 610 (B.A.P. 9th Cir. 1990). Here, the injunctions sought by the Debtor conflict with the
2 FTC's Federally mandated obligations under the FTC Act, express orders of the District Court, and
3 with the Bankruptcy Code itself.

4 Moreover, Section 105 does not allow entry of orders that create rights or immunities that
5 are not otherwise available to the debtor under non-bankruptcy law. Matter of Schewe, 94 B.R.
6 938 (W.D. Mich. 1989); In re FCX, Inc., 60 B.R. 405 (E.D.N.C. 1986). Here, the judge presiding
7 over the Federal Receiverships has issued multiple orders determining that the \$1.76 million being
8 held by the Debtor is property of the Receiverships and not property of the Debtor, and determining
9 that the automatic stay does not apply to the Payment Order or to the District Court Action, both of
10 which are an exercise of the FTC's Federal regulatory powers.

11 Because the Bankruptcy Code expressly exempts government police and regulatory actions
12 from the automatic stay, only in the rarest circumstances do courts find that a Section 105
13 injunction against a government agency is necessary to carry out the Code's provisions. See In Re
14 One Times Square Associates Limited Partnership, 159 B.R. 695, (S.D.N.Y. 1994), aff'd without
15 op., 41 F.3d 1502 (2d Cir. 1994), cert. denied, 513 U.S. 1153 (1995) ("11 U.S.C. 105 should be
16 used sparingly and then only to supplement the Bankruptcy Code, not supplant the Code."); In re
17 Oxford Management, Inc., 4 F.3d 1329, 1335 (5th Cir. 1993) ("The powers granted by" Section
18 105 "must be exercised in a manner that is consistent with the Bankruptcy Code") (citations
19 omitted); United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986) (Section 105 "does not
20 authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under
21 applicable law, or constitute a roving commission to do equity"). "[S]ection 105 does not give
22 bankruptcy courts the authority to contravene specific provisions of the Code." In re Continental
23 Airlines, Inc., 61 B.R. 758, 781 n. 47 (S.D. Tex. 1986). "The bankruptcy court is limited by the
24 express terms of the Code; the court must apply bankruptcy law, not rewrite it." Id; See also, In re
25 Minor, 115 B.R. 609 (D. Colo. 1990) (Section 105 does not authorize issuance of orders that
26 conflict with other provisions of Bankruptcy Code)

27 The limited circumstances in which a bankruptcy court may enjoin a government action are:
28 (1) where that action seeks control over the assets of the estate, or (2) where it so severely threatens

1 the assets of the estate, that it directly conflicts with the Bankruptcy Code. The Ninth Circuit held
2 in Co Petro that a "conflict" with the Bankruptcy Code is not established simply by showing that
3 the relief sought by the government's regulatory action may reduce the value of the bankruptcy
4 estate. Commodity Futures Trading Com'n v. Co Petro Marketing 700 F.2d 1279, 1284 (9th Cir.
5 1983). Distinguishing the Eighth Circuit's decision in Missouri v. Bankruptcy Court, 647 F.2d 768
6 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982), the Co Petro court explained that the regulatory
7 action in that case conflicted with the Bankruptcy Code because it was a parallel state-law
8 insolvency proceeding:

9 [i]n Missouri, the regulatory law in question was a state law empowering the state to
10 operate and liquidate insolvent grain warehouses. If the state court suit under that law had
11 been allowed to proceed, it would have conflicted with the administration of the debtors'
12 estate in the bankruptcy court.

13 Co Petro, 700 F.2d 1279, 1284 (9th Cir. 1983). Here, no such conflict is present. See, e.g.,
14 In re Tucson Yellow Cab Co., 27 B.R. 621, 624 (B.A.P. 9th Cir. 1982) (striking down bankruptcy
15 court's Section 105 injunction, holding that "we do not agree that the issuance of a[n NLRB] back
16 pay order, based upon a plain statutory right, forms [an enjoinable] threat to a debtor's estate, even
17 though that order may greatly enhance the amount of priority obligations payable from the estate").

18 First, it is clear that the so called, "Payment Order" does not seek control over assets of the
19 estate; rather, it seeks a return of property of the Receiverships back to the Receiver. Second, the
20 required turnover of property of the Receiver does not threaten the assets of the estate in conflict
21 with the Bankruptcy Code. The only argument articulated as to the potential damage the estate will
22 suffer as a result of the continuance of the Florida Action, is that the estate will have to expend
23 "substantial attorney's fees" and "divert the management's attention away from reorganization."
24 Debtor's Memo of Points and Authorities at p. 2. In addition, the Debtor cannot rest on its
25 argument that if required to turn over funds that it does not own, it will be forced out of business.
26 The Debtor is simply asking, through this Motion and the Cash Collateral Motion, to use property
27 of the Receivership in aid of its reorganization efforts. The Debtor has not offered any evidence
28 that it has sought other avenues of financing (other than the involuntary use of someone else's

1 property) in order to maintain its operations over the near term. It is not the fault of the
2 Receivership that the Debtor entered reorganization proceedings without a clearly defined strategy
3 for maintaining its business other than to spend the Receivership's money.

4 2. The Debtor is Improperly Attempting to Overturn the Prior Order from the District Court
5 Vacating the Stay as to the District Court Action.

6 The Court's equitable powers under 105(a) do not allow a party to re-litigate issues that
7 have previously been determined. Only proof of a substantial change in circumstances will justify
8 changing what has been decreed. Chrysler Capital Corp. v. Official Comm. of Unsecured Creditors
9 (In re Twenver, Inc.), 149 B.R. 950, 954 (D.Colo.1993); see also, In re Bryant 296 B.R. 516, 519
10 (Bankr. D.Colo.,2003.) (Debtor improperly seeking to re-impose the automatic stay after it was
11 already terminated by creditor's motion).

12 Here, the Debtor has not demonstrated any change in circumstances so as to justify the
13 relief requested. The orders from the District Court, entered pre-petition, and reiterated post-
14 petition, require the turnover of property not owned by the Debtor, under penalty of contempt.
15 Having failed to convince the District Court that the automatic stay applies to the District Court
16 Action (and now conceding as such at least with respect to the FTC), the Debtor is now attempting
17 to obtain extraordinary relief of 105(a) to re-litigate and overturn the prior rulings from the District
18 Court that the automatic stay does not apply and that the Receivership's money should be turned
19 over to the Receiver. The relief requested is simply a re-litigation of issues that have previously
20 been determined which is not appropriate or authorized under section 105.

21 3. The Debtor Did Not Satisfy the Test for Injunctive Relief Under Section 105.

22 Not only must Section 105 injunctions be used only sparingly in respect of governmental
23 actions, under the principles discussed above, they may not be issued in the absence of the rigorous
24 showing required for any injunctions. See EEOC v. Rath Packing Co., 787 F.2d 318, 325 (8th Cir.
25 1985), cert. denied, 479 U.S. 910 (1986); see also S. Rep. No. 95 989 at 51, reprinted in 1978
26 U.S.C.C.A.N. 5787, 5837. The Court of Appeals for the Ninth Circuit employs either the
27 traditional four-point inquiry or an alternative balancing standard. Stanley v. Univ. of S.
28 California, 13 F.3d 1313, 1319 (9th Cir. 1994). Here, the Debtor satisfied neither standard --- nor

1 can it. As discussed above, courts entertain such relief where assets of the estate are threatened.
2 Again, the Receivership Funds are not assets of the bankruptcy estate.

3 The Debtor relied exclusively on the balancing standard. Under this standard, the court
4 balances the debtor's likelihood of success against the relative hardships to the parties. Sun
5 Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999). The Debtor failed to
6 show "either a likelihood of success on the merits and the possibility of irreparable injury, or that
7 serious questions going to the merits were raised and the balance of hardships tips sharply in [their]
8 favor." Id. This is illustrated by the very case Debtor cites, Alliance Mortgage, supra.

9 The Debtor has not made any showing that it will prevail on the merits of the District Court
10 Action, which sets out clear violations of federal statutes. In re Commonwealth Oil Refining Co.,
11 Inc. 805 F.2d 1175, 1189, 805 F.2d at 1189 (courts must examine whether the debtors are likely to
12 succeed in the underlying enforcement action). Nor has the Debtor made any showing that it will
13 prevail on matters concerning the receivership funds (which matters specifically relate and refer to
14 orders entered on behalf of the FTC in addition to the Receiver) that are currently on appeal in the
15 11th Circuit.

16 In addition, the Debtor made no showing of irreparable harm. The Dawson Declaration is
17 conclusory and consists mainly of paragraphs from the Motion making arguments and assertions.
18 There is little evidence, if any. Litigation expenses do not alone allow injunctive relief nor do they
19 constitute as "irreparable harm". Alliance Mortgage, supra.

20 Congress by excepting certain actions from the automatic stay provision recognized that the
21 debtor would likely incur litigation expense as a result of any excepted lawsuit. . . .Congress has
22 therefore implicitly recognized that litigation expenses alone do not justify a stay of a proceeding.
23 Rath Packing Co., 787 F.2d at 325.

24 Finally, the balance of the hardships weighs in favor of the Receiver. The Receiver, if
25 enjoined, will be forced to "sit by and watch" while its funds are spent by the Debtor in aid of its
26 supposed reorganization efforts, thus rendering moot any relief afforded to the Receiver by the
27 District Court. The Debtor has not, and cannot, offer the Receiver any adequate protection for the
28 use of its money while the appeals filed by the Debtor are prosecuted. Nor does the Debtor offer to

1 post a bond or other form of protection for the Receiver's funds. The Debtor simply expects this
2 court to enjoin the Receiver from enforcement of its turnover orders while it concurrently spends
3 the Receiver's money. The Receivership Funds would be spent, contrary to the District Court order
4 and the District Court's remedy will be rendered meaningless

5
6 **III.**

7 **CONCLUSION**

8 For the foregoing reasons, the Debtor's Motion should be denied. The Federal Receiver
9 also respectfully requests that this Court order the Debtor to comply with the Orders of the District
10 Court and immediately turn over the \$1,762,762.56 to the Federal Receiver. If this Court,
11 however, is inclined to grant the TRO, it is requested to order the segregation of the Receivership
12 Funds, enjoin the use or transfer thereof, or require their deposit with the Court. The Federal
13 Receiver further requests all other appropriate relief in the premises.

14 Dated: September 25, 2007

DANNING, GILL, DIAMOND & KOLLITZ, LLP

15
16 By: 

17 STEVEN J. SCHWARTZ
18 Attorneys for David R. Chase, Court-
19 Appointed Receiver
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